

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBBIE R. TIPPIN)	
Claimant)	
VS.)	
)	Docket No. 204,191
SEDGWICK COUNTY)	
Respondent)	
Self-Insured)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge John D. Clark on January 13, 1998. The Appeals Board heard oral argument July 10, 1998.

APPEARANCES

Chris A. Clements of Wichita, Kansas, appeared on behalf of claimant. E.L. Lee Kinch of Wichita, Kansas, appeared on behalf of respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded benefits for a 78 percent work disability. On appeal, respondent asks for review of the following issues:

1. What is the nature and extent of claimant's disability and what, if any, is the amount of compensation due?
2. Is respondent entitled to a credit or offset under the terms of K.S.A. 44-501(h)?

Findings of Fact and Conclusions of Law

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified to a 52 percent work disability.

Findings of Fact

1. Claimant, a 41-year-old with a high school education, worked for Sedgwick County as detention deputy for approximately nine years before he injured his back at work on July 6, 1995.

2. Claimant received treatment initially from Dr. Val J. Brown, Jr., who gave a steroid injection and recommended restrictions, and then from Dr. Thomas W. Kneidel, who performed surgery at L5-S1 for a herniated disc. Claimant continued to have problems after the first surgery and on June 17, 1996, Dr. Robert L. Eyster performed a fusion at the L4-S1 region.

3. There appears to be no dispute that claimant could not, because of the injury and resulting restrictions, return to the job he was doing at the time of the accident. In fact, claimant has been placed on KPERS disability.

4. The record contains functional impairment ratings and restrictions by three physicians. Dr. Robert L. Eyster and Dr. Lawrence R. Blaty both testified. The report from Dr. Robert A. Rawcliffe, who performed an independent medical evaluation at the request of the ALJ, was also considered.

5. Dr. Rawcliffe saw claimant April 10, 1997, and rated the impairment as 22 percent of the whole body. He also recommended claimant be restricted to the light category of work as defined by OSHA:

. . . with occasional lifting of up to 20 pounds, more frequent lifting of up to 10 pounds, avoidance of bending, crouching, kneeling, crawling or the like. He should not be required to sit longer than one hour at a time without having the opportunity to get up and walk for short periods and change position.

6. Dr. Eyster rated claimant's impairment as 15 percent of the whole body. He recommended no single lift over 40 pounds, lift up to 40 pounds occasionally, no repetitive lift over 20 pounds, and no repetitive forward bending, meaning in excess of four times per hour. Dr. Eyster reviewed two task lists prepared by Ms. Karen C. Terrill, one based on claimant's description of the tasks and one based on the employer's description. From the list prepared from claimant's description, Dr. Eyster agreed with Ms. Terrill and identified 10 of 19 tasks claimant could not perform, for a 53 percent loss.

Dr. Eyster also reviewed a list of the tasks performed in the employment which Ms. Terrill prepared based on descriptions from the employer and her own observations of the job. This list, Attachment B to her report, actually contains 15 tasks. Added to the tasks claimant described for the three other jobs in the 15 years—Armored Services, Inc.,

Department of Navy, and El Cajon Valley Patrol—gave a total of 23 tasks.¹ Dr. Eyster disagreed with Ms. Terrill on one task and testified claimant could not perform, from the list based on the employer's description, two of the tasks performed for respondent. When combined with his opinion on the tasks described by claimant for the other three jobs, Dr. Eyster identified 7 of the total 23 tasks, or 30 percent, claimant cannot now perform.

7. Dr. Blaty examined claimant on April 15, 1997. He rated the impairment as 20 percent of the whole body and recommended claimant limit his work to the light physical demand category. Specifically, he recommended claimant not lift or carry greater than 25 pounds occasionally. He also recommended he be limited to occasional bending or twisting and avoid prolonged weight-bearing activities for more than one-hour intervals at a time with the opportunity for positional changes and non-weight bearing. Finally, he recommended claimant be limited to occasional climbing and avoid working at unprotected heights requiring the use of both legs. Dr. Blaty reviewed a list of tasks prepared from claimant's description of the tasks. The list included jobs more than 15 years before claimant's injury in July 1995. Excluding those tasks performed more than 15 years before the accident, Dr. Blaty identified 16 of 23 tasks claimant cannot now perform for a 70 percent loss.

8. Captain Gary Steed gave testimony which contradicted the task description claimant gave for many of the tasks Dr. Blaty excluded as ones claimant cannot now perform. The Board finds his testimony particularly significant as to 3 of the 16 tasks Dr. Blaty eliminated—laundry, phone communications, and slider control. In each case, Captain Steed has provided a credible description of the task which indicates it would not include activity which Dr. Blaty testified eliminated the task. Captain Steed gives similar testimony for seven other tasks, but those other tasks also involve contact with the inmates. Dr. Blaty testified claimant should not, because of his injury, be involved in working around the inmates because of the potential he would need to, but would not be able to, defend himself or even avoid problems. For this reason, the Board concludes Dr. Blaty's opinion, eliminating the above-identified 3 tasks from the list claimant cannot do, remains as an opinion that claimant cannot do 13 of 23 tasks or 57 percent. The Board notes the laundry task is listed as one which involved inmate control, but Captain Steed's description suggests the task would not as it involves monitoring from a remote site. This task is, therefore, one of the three that the Board finds shall not be eliminated.

9. The Board finds claimant has lost the ability to perform 44 percent of the tasks he performed in the work he did during the 15 years preceding his accident. This conclusion gives equal weight to the opinion of Dr. Eyster (30 percent loss), based on the task list prepared by Ms. Terrill using the task descriptions provided by the employer, and the opinion of Dr. Blaty (57 percent loss) adjusted by eliminating tasks performed for more than 15 years

¹ At page four of her report, Karen Terrill lists these tasks but omits two tasks, laundry and delivering food, performed for respondent. Her list on that page and the calculations on that page are erroneously based on only 13 tasks performed for respondent and then a total of only 21 tasks. Dr. Eyster actually reviewed 15 tasks performed for respondent, contained in Attachment B, from the list based on the employer's description of the tasks. Combined with the other jobs, he reviewed 23 tasks.

before the accident and also eliminating from the list he cannot do the three tasks which the testimony of Captain Steed convinces the Board are ones claimant can do.

10. Claimant has made no effort to find other employment since leaving work for respondent.

11. Based on the testimony of Ms. Terrill, the Board finds claimant has the ability to earn \$9 per hour or \$360 per week.

12. Claimant began receiving KPERS disability benefits in July 1996.

Conclusions of Law

1. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

2. K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

3. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts to find employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foult v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

4. In this case, a wage of \$9 per hour or \$360 per week will be imputed to claimant for purpose of calculating the wage loss. The parties stipulated to an average weekly wage of \$904.36. Claimant's wage loss is, therefore, 60 percent.

5. Claimant has, and is entitled to benefits for, a work disability of 52 percent based on a wage loss of 60 percent and a task loss of 44 percent.

6. K.S.A. 44-501(h) provides that retirement benefits paid for by the employer offset against workers compensation benefits. But the Board concludes the benefits paid claimant were not retirement benefits. Regardless of the label, the benefits were paid claimant because of a disability. The Board has construed retirement benefits as only those paid based on age or longevity. *Green v. City of Wichita*, Docket No. 190,467 (August 1997). Respondent, therefore, is not entitled to an offset.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on January 13, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Robbie R. Tippin, and against the respondent, Sedgewick County, a qualified self-insured, for an accidental injury which occurred July 6, 1995, and based upon an average weekly wage of \$904.36, for 59.42 weeks of temporary total disability compensation at the rate of \$326 per week or \$19,370.92, followed by 192.70 weeks at the rate of \$326 per week or \$62,820.20 for a 52% permanent partial disability, making a total award of \$82,191.12.

As of October 30, 1998, there is due and owing claimant 59.42 weeks of temporary total disability compensation at the rate of \$326 per week or \$19,370.92, followed by 113.72 weeks of permanent partial disability compensation at the rate of \$326 per week in the sum of \$37,072.72, for a total of \$56,443.64, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$25,747.48 is to be paid for 78.98 weeks at the rate of \$326 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
E.L. Lee Kinch, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director